IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

DOUGLAS M. HAYES, on behalf of himself and all others similarly situated and derivatively on behalf of Nominal Defendant ACTIVISION BLIZZARD, INC.,	:	
Plaintiff,	:	
v	:	Civil Action No. 8885-VCL
ACTIVISION BLIZZARD, INC., PHILIPPE G.H. CAPRON, JEAN-YVES CHARLIER, ROBERT J. CORTI, FREDERIC R. CREPIN, JEAN-FRANCOIS DUBOS, LUCIAN GRAINGE, BRIAN G. KELLY, ROBERT A. KOTICK, ROBERT J. MORGADO, RICHARD SARNOFF, REGIS TURRINI, VIVENDI, S.A., AMBER HOLDING SUBSIDIARY CO., ASAC II LP, ASAC II LLC, DAVIS SELECTED ADVISERS, L.P., and FIDELITY MANAGEMENT & RESEARCH CO.,	:	
Defendants.	:	

- - -

Chancery Courtroom No. 12C
New Castle County Courthouse
500 North King Street
Wilmington, Delaware
Wednesday, September 18, 2013
10 a.m.

- - -

BEFORE: HON. J. TRAVIS LASTER, Vice Chancellor.

- - -

ORAL ARGUMENT ON PLAINTIFF'S MOTION FOR A TEMPORARY RESTRAINING ORDER and RULINGS OF THE COURT

CHANCERY COURT REPORTERS
New Castle County Courthouse
500 North King Street - Suite 11400
Wilmington, Delaware 19801
(302) 255-0524

APPEARANCES:

MICHAEL HANRAHAN, ESQ.
GARY F. TRAYNOR, ESQ.
PATRICK W. FLAVIN, ESQ.
ERIC J. JURAY, ESQ.
Prickett, Jones & Elliott, P.A.
-and-
ERIC L. ZAGAR, ESQ.
ROBIN WINCHESTER, ESQ.
MATTHEW A. GOLDSTEIN, ESQ.
of the Pennsylvania Bar
Kessler, Topaz, Meltzer & Check, LLP
for Plaintiff

EDWARD P. WELCH, ESQ.
EDWARD B. MICHELETTI, ESQ.
SARAH RUNNELLS MARTIN, ESQ.
LORI W. WILL, ESQ.
Skadden, Arps, Slate, Meagher & Flom LLP
for Defendant Activision Blizzard, Inc.

COLLINS J. SEITZ, JR., ESQ.
GARRETT B. MORITZ, ESQ.
ANTHONY A. RICKEY, ESQ.
Seitz, Ross, Aronstam & Moritz LLP
-and-
WILLIAM SAVITT, ESQ.
RYAN A. McLEOD, ESQ.
of the New York Bar
Wachtell, Lipton, Rosen & Katz LLP
for Defendants Robert J. Corti, Robert J. Morgado, and Richard Sarnoff

R. JUDSON SCAGGS, JR., ESQ.
ANGELA C. WHITESELL, ESQ.
Morris, Nichols, Arsht & Tunnell LLP
-and-
DIANE L. McGIMSEY, ESQ.
of the California Bar
Sullivan & Cromwell LLP
for Defendants Brian G. Kelly, Robert A. Kotick, ASAC II LP, and ASAC II LLC

Continued ...

APPEARANCES: (Continued)

RAYMOND J. DiCAMILLO, ESQ.
Richards, Layton & Finger, P.A.
-and-
MICHAEL FARHANG, ESQ.
of the California Bar
Gibson, Dunn & Crutcher LLP
for Defendants Philippe G.H. Capron, Jean-Yves Charlier, Frederic R. Crepin, Jean-Francois Dubos, Lucian Grainge, Regis Turrini, Vivendi, S.A., and Amber Holding Subsidiary Co.

P. CLARKSON COLLINS, JR., ESQ.
Morris James LLP
-and-
STEVEN B. FEIRSON, ESQ.
of the Pennsylvania Bar
Dechert LLP
for Defendant Fidelity Management & Research Co.

- - -

THE COURT: Welcome, everyone.

ALL COUNSEL: Good morning, Your Honor.

THE COURT: Mr. Hanrahan, how are you, sir?

MR. HANRAHAN: Fine; thanks. Your Honor, with me are Gary Traynor, Patrick Flavin, and our most recent addition to the firm, Eric Juray.

THE COURT: Welcome.

MR. HANRAHAN: He finished his Supreme Court clerkship. Given Your Honor's comments about clerks, we were hoping to somewhat even the --

THE COURT: Oh, that's right. That's good. Well, one Supreme Court clerk is worth two Chancery clerks.

(Laughter)

MR. HANRAHAN: Thank you.

THE COURT: You skipped over Mr. Zagar.

MR. HANRAHAN: No. I was going to then get to the members of Mr. Zagar's firm, Eric Zagar, Robin Winchester, and Matthew Goldstein.

THE COURT: Good to see you-all.

MR. HANRAHAN: Good morning, Your

Honor, and thank you for hearing us.

In the language of corporate law, there are terms describing transactions that have a fairly precise meaning, such as "merger." And then there are other terms to describe transactions where the meaning is imprecise and may vary with the context. "Business combination" is one of those terms. Unlike for a merger, there are no required terms or specified steps for a business combination. That is because a business combination can take many forms and have varied elements.

A merger is generally considered a business combination. A sale of substantially all assets may be considered a business combination. Other corporate actions or a set of collected actions may be described as a business combination.

Now, because the phrase "business combination" can mean different things, there is often an attempt to define in a statute a certificate of incorporation or a contract what the term "business combination" means in that particular circumstance.

Over 25 years ago I spent time with some very smart Delaware lawyers on the subcommittee that drafted Section 203, talking about the parameters

of the term "business combination." Because of concerns about how an interested stockholder might try to evade the restrictions of the statute, the definition of prescribed business combinations in Section 203 was very broad in most respects. However, in one respect the combination was deliberately limited, because state takeover statutes had been struck down as unconstitutional under federal law. Section 203's definition of "business combination" and, indeed, the statute as a whole, stayed away from regulating tender offers.

So there was a concerted effort to define what was and what was not a business combination in the context of the state takeover statute that sought to limit what transactions an interested stockholder could engage in.

And for many years, the term "business combination" has been frequently defined in different ways, in certificates, in contracts. In contrast, in 2008, when Activision and Vivendi chose to use the term "business combination" in Section 9.1(b) of Activision's certificate of incorporation, they made no attempt to define the term, though anyone familiar with corporate parlance would know the term has no one

meaning.

In the proxy statement sent to the Activision stockholders, which included a vote on Section 9.1(b) -- there was a vote on a whole bunch of different elements. And it was one -- their one-sentence description of that section gave no explanation of any of the terms of Section 9.1(b). It certainly did not indicate that the term "business combination" would have some narrow meaning.

Under Delaware law, the consequences of defendants' decision not to define "business combination" in Section 9.1(b) is that the rule of construction favoring stockholder voting rights applies. Because the term "business combination" is ambiguous, it must be construed against the defendants who created the ambiguity. The term must be interpreted in a way that would give the stockholders the broadest voting right. Thus, the standard, we believe, should be whether there's any reasonable interpretation of the term "business combination" as used in Section 9.1(b) that would read on the stock purchase agreement this collection of steps that's in a contract where Vivendi and Activision are both parties.

Given the broad meaning of the phrase "business combination" and the language that surrounds that phrase in Section 9.1(b), we believe the conclusion is inescapable that Section 9.1(b) reads on the stock purchase agreement.

THE COURT: I want to make sure at some point in your argument -- whether you want to do it now or later is up to you -- you do walk me through the rules of construction, because I want to make sure I get it right, and I want to make sure what the rules of construction really are after the Airgas appeal.

MR. HANRAHAN: Okay. I think, Your Honor, the -- the rules of construction are that where there is -- and we go through the Jana case and the other cases. And I'll try to summarize them. And if Your Honor has questions on particular parts --

THE COURT: Well, let me just tell you -- let me tell you what I'm wondering about, and then maybe you can shed light on it.

Is there a difference between a default stockholder voting right that exists under the DGCL, such as the right to elect directors or a 251 voting right, and an incremental voting right. such as would be held by preferred stockholders or, here,

majority-of-the-minority stockholders? Is there a broad reading given to one and a narrow reading given to others? If -- whatever the answer to that is, let's shift over to a second question.

You know, at the trial level, in the Airgas bylaw case, the Chancellor applied the principle of construction -- principles of construction I think you endorse and that we traditionally apply; but on appeal, you know, some very excellent lawyers convinced the Supreme Court not to look to those and instead to think about extrinsic evidence and not to apply any presumption at all.

So does that mean that the presumptions are now out the window or are we still -- do we still have any presumptions?

MR. HANRAHAN: I think we do, Your Honor. And the -- I think the way the -- the presumptions work -- and it's been refined -- is I think the key element with a statute, you may have legislative history, and that's fair to consider. The -- the concept underlying the rule of construction in favor of franchise rights is that the stockholders, they're not there at the drafting. And so to the extent there is an ambiguity, they're not in a

position to be putting in extrinsic evidence. And you really have to look to what does it mean to the stockholders. And I think that's particularly true here, where the stockholders were given a vote on this but they weren't told this is what it means. It not only wasn't defined in the certificate itself; when it was explained to the stockholders, there was no attempt whatsoever. And in that situation the ambiguity has to go -- even in a -- a -- the contra proferentem sense of Kaiser, has to go against the defendants.

THE COURT: So I guess -- it sounds like you would -- so in this case, as you pointed out, the disclosures were minimal and basically just described -- paraphrased what was in the contract. It sounds like you would distinguish Airgas as a case where there actually was a lot of extrinsic evidence; while perhaps not related to the specific relationship, there's a lot of stuff that you could grab onto in the proxy statements and other things. And so that perhaps is what got them out of the presumptions there.

But now think with me -- so contra proferentem is one approach. The other approach,

though, is that these rights are supposed to be narrowly construed, because if they're beyond what's already in the DGCL, you're limiting corporate flexibility. And so we want to construe them narrowly so as to limit -- so as to avoid overlimiting corporate flexibility. Obviously, contra proferentem points in one direction. The don't-limit-corporate-flexibility points in the other direction. Which way do I go in this case --

MR. HANRAHAN: Well, Your Honor --

THE COURT: -- and why?

MR. HANRAHAN: -- I think you go in the first direction, for -- for a number of reasons. First of all, narrowly construed. Well, yeah, but when one side had an opportunity to define what "business combination" meant. And that's a term that they know has a broad meaning. So if they -- in that situation, if you know you want a narrow interpretation, then I think the burden has to be on -- on the draftsmen to address that by defining it. They could have defined it by reference to -- to Section 203. They could have defined it more narrowly the way, for example, the Emerald Partners, the certificate provision there. They could have done

that.

The second thing that I think is important here, Your Honor, is what are the terms that are around the phrase "business combination"? "any," "similar transaction," and then "involving." And -- and Chancellor Strine in Martin Marietta does an excellent job of distinguishing between "between" and "involving." And now the defendants throw up bylaw 3.12.

And it's very interesting because that talks about an agreement or transaction "between," whereas 9.1(b) doesn't use the word "between" and says "involving." Why is that? It indicates it's a broader provision. It indicates that it may encompass transactions or actions where there's not an actual agreement between Activision and Vivendi. But the type of analysis that, in Home Shopping, where the Court said "Well, in that context, 'involving' can't refer to a tender offer because of a statutory history" -- and that takes us back -- there, there was legislative history that the Court could look to for guidance.

The other thing is, Your Honor, there isn't any extrinsic evidence that's -- that's here, as

far as we know. So what the Court is left with is the ambiguous term that the defendants put in this provision. And then you look at it. You've got the broad language around it. And then you have to say "Well, what would a reasonable stockholder expect?"

You have a -- you know, what's the purpose of Section 9.1(b)? It's to protect the stockholders from significant things that may involve Vivendi. And they use a particular phrase, "any merger business combination or similar transaction" involving Activision and Vivendi.

And so when you look and that and you look at this transaction, it's got elements that are very similar to the elements of the 2008 business combination. You're talking about $5.83 billion of Activision's money going out the door to Vivendi. You're talking about the company borrowing $4.5 billion of debt to pay Vivendi.

You've got -- then you've got this other piece where Vivendi, in effect, buys off management by saying "Well, we'll give you a piece of the action." We believe that a reasonable stockholder would expect to get a full explanation of the transaction and to get a vote under the language of

Section 9.1(b).

THE COURT: I mean, what your friends have been saying, perhaps not in exactly these words, is that "We have evidence that reasonable stockholders don't think that because you're the only one clamoring for this."

MR. HANRAHAN: Well, Your Honor, of course -- it maybe gets me ahead of myself; but, you know -- of course, the transaction's announced, and what do they talk about? They -- they only talk about really one piece of it, and they're still not talking about that in their brief or their expert affidavit. They don't want to say anything about this side deal with management. So it's portrayed in a particular way.

And most people, you know -- okay. Yeah, their expert, he says, "Oh, well, you know, this is what a news report said and this" -- that's where most people get their information. And they try to task us with "You guys didn't figure this out soon enough." Well, you had a transaction that's announced. You start looking at the very complicated agreements that you have here. And, frankly, it doesn't look like a case where there's a basis for

some expedited proceeding. Now, in order -- it's only after you get past that level of analysis and -- and eventually, as we do in cases -- and I don't know that every stockholder or every law firm that represents stockholders does this; but at some point we go back and we look -- we start looking at secondary documents -- they're not directly related to the transaction -- and you find the certificate of incorporation.

So the fact that the -- the stockholder in California didn't raise it, I don't know whether Robbins Arroyo ever got around to looking at the certificate of incorporation.

THE COURT: I hear you on that. I think what -- what I would -- and that's why I said they're not saying it in so many words.

I think the premise of your argument, though, was that the folks who voted for this certificate provision in 2008 believed reasonably when one saw this provision that one would get a future vote on something like this. I know we've got short holding periods and high turnover, but some of those folks ought to still be around. They -- you know, those are the folks who would have said when this happened, "Hey, we remember back in 2008 you weren't

supposed to do this type of thing." That's basically your pitch. "Where are those guys? You know, why aren't you able to point to Seeking Alpha" or some -- one of these other sites where investors go to chat about these things where there are angry people who are saying "We reasonably understood and we voted for this deal in 2008 that they wouldn't be able to pull a stunt like this."

MR. HANRAHAN: Well, Your Honor, maybe they would be saying that if they got a proxy statement that explained, for example, why this private sale is being done and what the effect is. They haven't done that.

So, you know, I think you're saying "Well, oh, well, why hasn't somebody, with partial information, gone through these very complex documents and then gone and analyzed a 13-page certificate of incorporation?" You know, I -- I do those sort of things because I guess I like it for some strange reason, but generally people aren't going to do that. But I think that's basically the -- the purpose that lawyers like myself ought to serve, is that somebody does go look. And they can say I didn't look fast enough or whatever, but I did find it. And we don't

know what stockholders would say if they were presented with all the facts. And they haven't been. It's been -- it's been portrayed in a particular light, deliberately downplaying, indeed barely mentioning this -- this management piece, and not talking at all about what the effect of that may be on the stockholders going forward. And there certainly is no discussion of Section 9.1(b).

So to say well, somebody -- somehow -- I don't understand how stockholders are held to some, you know, impossible standard where they're supposed to know everything about every company they have an investment in.

The defendants end up -- their primary argument is really that Section 9.1(b) is clear and unambiguous on its face. And that's a tough argument, especially because you've got the rule about interpreting provisions in favor of the franchise and you've got the language surrounding the term "business combination."

So what do they -- they cite some on-line dictionaries, some non-Delaware cases about a combination of storage tanks and they say, "Oh, that means" -- "that shows that 'business combination' can

only mean a combination of the companies or their assets." Well, that's difficult to square with the -- the use of the term "business combination" in the corporate world, the broad definitions of "business combination" in Section 203, and cases like Martin Marietta that have said you really can't say that "business combination" has a single, clear meaning. And that's particularly true in light of the broad language surrounding it in Section 9.1(b).

Now, they -- also, when you look at it, the stock purchase agreement, in fact, does involve a combination of assets: the stock of a Vivendi subsidiary and the underlying assets of that subsidiary, which are -- include both Activision shares and $676 million of net operating loss carryforwards that they just kind of sluff over repeatedly, and those are going to be combined with Activision's assets. Activision will transfer $5.83 billion of cash, an asset of -- of Activision, to Vivendi.

The combined business originally established in 2008 continues, with a somewhat different asset mix, a somewhat different capitalization, somewhat revised stock ownership, and

you've added a third party to the business -- a third partner to the business combination, ASAC. You have an amended investment agreement. You're amending the one that you entered into in 2008. You got the same unusual certificate and bylaw provisions. Well, Your Honor, that looks, sounds, and walks like a business combination.

On the other hand, the stock purchase agreement does not look, sound, or walk like a divorce. I have had the misfortune to have experienced divorce. This is not a divorce. For starters, Vivendi is not taking back Vivendi Games. It's premarital property. It is, instead, selling another subsidiary to Activision, whose assets include net operating losses attributable to Vivendi Games.

Now, I've never heard of that in a divorce. Vivendi will still own Activision stock. It will still have an investor agreement with Activision, and Activision will still have the certificate and bylaw provisions from 2008, many of which specifically refer to Vivendi. And ASAC will join as a third participant in the combination.

So it is not a divorce. I guess in Vivendi's native tongue, you would call it a menage a‘

trois. It's now a three-party combination.

Your Honor, there are -- we've covered a lot of ground on business combination. And obviously there are many things in our brief. Are there particular questions Your Honor has that I can address regarding the colorable claim aspect of -- of the -- the argument?

THE COURT: No. Why don't you keep going.

MR. HANRAHAN: Let me hit just a few other points on -- on that. Your Honor, the -- we've talked about -- in our brief about Section 203(c)(3)(ii). And we think that -- that plainly reads on here. That's an example of the type of provision you would put in when you want to protect against actions by a controlling stockholder.

Now, the defendants cite Home Shopping, and that goes back to the point I made earlier about tender offers. And what Home Shopping was -- dealt with was a tender offer, a hostile tender offer. And the question was under 203(c)(4), was that involving Home Shopping. And the Court concluded no because of the unique history of Section 203, because of the legislative history that said "No; we were

deliberately carving out tender offers."

But what we have here is not a tender offer, first of all. Second of all, we have an agreement to which Activision is a party. And third, as we've explained, the stock purchase that's involved is buying the stock of a Vivendi subsidiary. It's the equivalent of doing it by a merger. And it is not simply a unilateral tender offer. It's a transaction that involves both companies, plainly. They even have a lengthy contract to that effect.

Let me turn to irreparable harm. There really doesn't seem to be much dispute that deprivation of a voting right is irreparable harm. Once the stock purchase agreement is closed, the stockholders cannot get the lost opportunity back. Quantifying damages from a lost vote will not be easy. The defendants have certainly not offered any theory as to how it would be done.

THE COURT: No, none of them are willing to step up to pay any judgment, either. They want to contest jurisdiction. They want to feel free to -- you know, I was hoping for some help on that point, and I certainly didn't get it.

MR. HANRAHAN: You certainly didn't

get it from Vivendi, Your Honor, who says "No, it can't be unwound. We'll fight personal jurisdiction, and we'll otherwise seek to avoid providing any relief."

THE COURT: "Even though we agreed to jurisdiction in the transaction agreements, we're not subject to jurisdiction here for this suit." It wasn't -- it wasn't a very helpful position to take in terms of solving a problem I asked for assistance on, but such is the tactical decisions that people make.

MR. HANRAHAN: Well, and I think Your Honor can expect that you'll get more of that. I mean, that is -- you know, they say, "Well, the stock will be with ASAC and Activision for a meaningful period." But you can't get the cash back, so you can't undo it. We're not sure -- you know, ASAC is a Cayman Islands entity. Good luck chasing them down. And then you'll have the usual things: the directors say "102(b)(7)," "141(e)." ASAC will say "We're not a party to the certificate; it's a contract claim." So they -- as Your Honor points out, none of them have stepped forward and committed to any relief that will be available if an injunction is not entered.

Now, they do -- let me turn to balance

of harms. They talk about the possible loss of the transaction. This is not a third-party merger where an independent bidder with no current stake in the company might walk away. Activision is not being acquired. The stockholders are not losing an opportunity to cash out. It is Vivendi who is trying to get cash.

Now, where is Vivendi going to go? It could not find a third-party buyer. Vivendi can't walk away from Activision. It's already there.

THE COURT: Couldn't they go back to this dividend alternative?

MR. HANRAHAN: They might or might not. And one could debate whether a dividend that's paid to everybody is better than leveraging up the company with $4.5 billion and paying 5.83 billion to -- to Vivendi, but that's -- that's not today's debate.

The point, though, otherwise --

THE COURT: What if it got repriced? What if Vivendi were to come back and say, "Look, we originally sold at 10 percent discount, but now we've seen how positive the reaction is to this deal, there's no way we're giving that you"? Wouldn't that

be harm or wouldn't that be harm that I would have to take into account in the balancing?

MR. HANRAHAN: Well, if Your Honor wants to speculate, I guess Your Honor would also have to then balance that off with what about if the -- if an injunction entered and the transaction got improved? What about if -- if we suddenly weren't given 25 percent of the company to management at a discount? So there's -- you know, I think that works both ways, and I don't think the Court -- the Court is -- is -- is not -- you may be too young for this. It's not Jean Dixon in terms of seeing the future.

But the point is, Vivendi is not going to walk away from Activision. If Vivendi terminates the stock purchase agreement, it's stuck. It does not receive $8 billion in cash and it still has $18 billion in debt.

They also talk about the loss of financing. But the defendants' expert admits that the bonds do not have to be repaid until December 18, 2013, if the transaction isn't closed. That's enough time to have a vote. I was also surprised to see that their expert says the bank financing hasn't been finalized yet. So they're speculating about losing

financing that they don't even have yet. In any event, the financing commitment continues until at least October 18, 2013. There's nothing in the record on the status of ASAC's financing, whether they have it or don't have it. And all you really have is speculation. And you look at the language of the affidavit, "Well, this could happen if this happens." So all they're doing is speculating and trying to essentially threaten the Court into denying injunctive relief because we might do something or something might happen that -- that might be bad.

The potential market profit. This is not a third-party merger where stockholders may lose a one-time opportunity to sell their shares at a premium. The -- and they try to act as if because the market price went up on a particular day, that that's an immediate profit to stockholders. Well, unless you sold on that day, it's not. The stock can go down tomorrow for a lot of reasons. It's not even clear -- they have to admit that "Oh, by the way, in the same press release where we announced this transaction, we also announced strong second-quarter results. We also raised our guidance for the year," independent of the transaction.

So there are a lot of things going on. And to try to say "Oh, this profited the stockholders" -- now, they're sort of caught with that, because if they say it profited the stockholders, yeah, that it's going to be more profit for the 25 percent piece that they're giving to management. And they don't -- they don't even have those shares yet. That's where there's going to be an immediate profit. When they get shares with a market value that's substantially above the 13.60, they're going to pay for them. There's where you're really in the money.

Your Honor, I think I -- I have already somewhat addressed the -- the laches issue. Is there anything Your Honor would care to hear further on that?

THE COURT: No. Thank you very much.

MR. HANRAHAN: Thank you, Your Honor.

THE COURT: Mr. Welch, how are you, sir?

MR. WELCH: Good morning, Your Honor. Thanks for hearing us this morning. We appreciate it.

THE COURT: Sure.

MR. WELCH: Your Honor, in -- in 2008

Vivendi and Activision combined their interests, and they called it a business combination. And they did it with something called a business combination agreement. Now, Vivendi contributed about -- a little bit more than $8 billion in gaming assets, a substantial amount of cash. They bought control of Activision. Ultimately their percentage interest got to about 61 percent of Activision stock. They bought the stock and they put the companies together. That's what they did.

Now, when that happened, there were also some amendments, also some amendments to the bylaws and the certificate of incorporation. Activision's bylaws, for example, in Section 3.12(a)(3) apply to all related-party transactions and require independent director approval for that. Specifically, it applied to any transaction or agreement between Activision and Vivendi, including a merger, business combination, or similar transaction. But certainly not limited to that.

Now, the charter, Your Honor, was different. Article IX, Section 9.1(b) did not apply to any transaction or agreement. It just didn't. Instead, it was limited to "any merger, business

combination or similar transaction." And that required minority stockholder approval. The charter did not include all other types of agreements and arrangements and related-party transactions. It just didn't.

What does that tell us? Well, it tells us that the parties, in drafting these instruments, knew how to draft a broad bylaw, on the one hand, and a narrow certificate of incorporation on the other. And that's the context here. That's what we're dealing with.

Now, plaintiff says in his TRO brief that the basis of the TRO is the failure to get stockholder approval for the SPA, the stock purchase agreement. And he says that there's a rule of construction in favor of the stockholder franchise rights, and he cites Airgas for that, understandably so.

Your Honor, no rule of construction says that we're supposed to do things that don't make sense. That's not part of Delaware jurisprudence. Common sense and plain meaning are part of the construction obligations that this Court will apply in construing a certificate of incorporation. Airgas,

which was cited by plaintiffs, says that the Court should give effect to the intent of the parties based upon the language of the certificate and the certificate -- and the circumstances surrounding the adoption. Your Honor, here, like the bylaws, broad bylaws, narrow charter. Common sense still applies. In fact, the Supreme Court in Airgas, which Your Honor inquired about specifically, made reference to common accepted meaning. Common sense is not out of the game. Common sense still applies.

Now, what's in issue here is the stock purchase agreement. So what's happening with the SPA? What's going on with that? Well, Activision is buying back its own stock from Vivendi. Vivendi is giving up control. This puts control back in the hands of the public. Activision will repurchase about 429 million shares for 13.60. It happens to be a deep discount. We can talk about that a little bit later.

So compare and contrast. In 2008 there was a business combination with a business combination in agreement -- a business combination agreement, and businesses were combined. In 2013, Your Honor, it's just the opposite. The combination's coming apart, no doubt about it. Vivendi sells down

from 61 percent to 12 percent. Other folks get involved. The public, on the other hand, jumps to 63 percent. It's a change in control. It's a change in control in favor of the public.

Now, the plaintiff here says the SPA, the stock purchase agreement, is a business combination or similar transaction. Now, I get that he didn't like the dictionary definitions; but if one is going to look at plain meaning and common sense, which is what the Supreme Court told us to do in Airgas, maybe, just maybe a good place to start is -- is the dictionary. The Cambridge Dictionary says business combination is where two companies come together. That's what it says. Now, Oxford says something similar.

All right. Now, he points out that the phrase in the charter that we're talking about starts off with the word "any," "any business combination." I think, Your Honor, we cited in our opening brief the Carolina Power & Light case. And it says "any" refers to the kind of combination, which must, by definition, unite, combine two things. Thus, "any" doesn't affect the meaning of "combination." It doesn't add anything to the party. The question is is

this a business combination.

The problem is this: In 2008, in the business combination agreement, Activision and Vivendi were combined. In 2013, the stock purchase agreement is pulling them apart. No doubt about it. And the word "any" doesn't change that.

Now, with respect, plaintiff is really stretching things way beyond the bounds of reasonableness to argue that the SPA, stock purchase agreement, is similar to a merger or business combination. Now, some people might say day is similar to night, north is similar to south, buying is similar to selling, and, as we heard, marriage is similar to divorce. You got two people. It's a highly emotional situation, but it isn't common sense. It doesn't come close. These are not similar situations. They are opposites. And what I'm saying is true here.

In 2008 there was a business combination with a business combination agreement, and businesses got combined. No doubt about it. 2013 we have a stock purchase agreement. Activision and Vivendi are splitting apart. In 2008, Vivendi bought Activision. In 2013, Vivendi is selling Activision.

They're opposites. They're not similar, and it just isn't common sense. There's just no way around that.

Now, it seems to me the certificate of incorporation could have said a vote is required for -- for any merger, business combination; or if you're doing the opposite of a business combination, we can have a vote for that, too. Could have said that, but it didn't. It's not common sense.

And as Your Honor pointed out, it's worth noting just for purposes of the record, that this is the only plaintiff that's saying it and other plaintiffs involved in related litigation are not. And the reason is it's not. What's going on here is not a business combination. There was no merger. There was no business combination. There was nothing similar that happened here. And, in fact, the opposite's occurring here what happened -- to what happened in 2013.

The charter provision doesn't apply. The accounting treatment, as -- as illustrated by the correspondence responding to Your Honor's letter, is totally consistent with that with respect to all the parties involved. The TRO ought to be denied.

There are a number of related

arguments, and I'm -- I want to be cautious about getting into them, Your Honor, just because I -- I don't want to take unnecessary time. Martin Marietta is an interesting case. Business combination, the Court said, is context specific. You got to look at it. And as the Court said in Airgas, we got to use our heads in applying common sense.

The plaintiff says Activision's buying the Vivendi-created shell, New -- New Vivendi Holdings, or Amber, as I guess it's sometimes called. Well, the SPA, the stock purchase agreement, specifically reps that Vivendi hasn't conducted any activities. Now, is it going to do some things necessary to bring about the stock purchase? Well, of course, it is, no doubt about that; but it's the vehicle to sell the stock. That's what it is. The fact they're shuffling some things around to make that happen doesn't change the fundamental nature of this transaction, that this is a stock purchase agreement, stock is being sold, unlike what happened in 2008.

THE COURT: How do you deal with the idea that for Delaware law purposes, being a holding company is a business?

MR. WELCH: Well, Your Honor, I would

look at what the Supreme Court told us to do -- and specifically Your Honor's referencing the fact that the holding company of the stock will be acquired by -- by Activision; is that the issue?

THE COURT: No. I was just thinking, we have this line of cases -- the one I think of most often is Chandler's decision in Seneca where people come in and say, "Hey, dissolve this company. It's not engaging in any business. It's just a holding company." The answer inevitably is "No. A holding company is a fine business."

What do I do with that?

MR. WELCH: I think what you do with it, Your Honor, is to apply what -- what I think the Supreme Court told us to do in a situation like this, and say -- and apply common sense and say to yourself, we had a broad bylaw, totally different than what we have here. That's the context that we're supposed to look at under the Airgas opinion.

Look at what happened simultaneously. They knew how to draft a real broad bylaw. They knew how to draft a narrowly focused certificate of incorporation. I think what we have to say to ourself -- let's use dictionary terms again.

Business, it involves buying or selling something. Let's be realistic about it. Let's use common sense. Respectfully, Your Honor, this is -- this is a vehicle that's used to achieve what? It's used to achieve the -- the acquisition of stock. It's a stock purchase, Your Honor, and that's what it is fundamentally, and that can't be ignored.

THE COURT: It's also achieving the acquisition of NOLs.

MR. WELCH: It is, sure, sure.

THE COURT: And NOLs have to relate to a trade or business. You just can't freely trade or sell NOLs.

MR. WELCH: Well, Your Honor, I say to myself a NOL, is that a business? Common sense, applying what would one think about an NOL, is an NOL a business? Of course not. Maybe it's an asset. It's a tax deduction. It's a tax deduction that fits with the fundamental transaction that's occurring here, a stock purchase agreement, the opposite of what happened in 2008.

So I think you look at the NOLs. They just don't add anything, not anything to the party here. They're a tax reduction. Nobody is running a

business with that tax deduction. It's just -- it's just a -- it's a potential asset. Is everyone -- would people say that the sale of every asset, individual asset is a sale of a business? I don't think so.

THE COURT: No. Again, my problem with that is you can't just freely sell NOLs.

MR. WELCH: Apologies, Your Honor. I couldn't hear you.

THE COURT: You can't just freely sell NOLs. Like, I've got NOLs. I can't just say "Here, Mr. Welch, you take them, you use them."

MR. WELCH: Perhaps not, Your Honor. Understood. However, it doesn't change the fundamental nature of what's going on here. In 2008 there was a combination. In 2013 the whole thing is coming apart. It's not a business combination. It's certainly not a merger, and it isn't something similar based on any application or the concepts of common sense that the Supreme Court tells us to apply in -- in --

THE COURT: So while we're on this, there's one thing I wanted your help on.

MR. WELCH: Yes, sir.

THE COURT: I understand my job to be that -- to try to apply these agreements, reading them as a whole. So one of the things I did was try to read this thing. In both the amended and restated investor agreement and in the stockholders' agreement there are standstill provisions. Both of the standstill provisions use the word "business combination or similar transaction."

So I don't know if you have it handy, the form of amended and restated investor agreement, page 8, Section 3.3. The Vivendi parties agree not to, among other things, "... enter into or agree, offer, propose or seek ... to enter into, or otherwise be involved in or part of, any acquisition transaction, merger or other business combination or similar transaction" -- so very similar transaction -- "relating to all or part of the Company or any of its subsidiaries ...."

I mean, it seemed to me like that would prevent Vivendi from making an offer to buy back Amber. Do you agree with that?

MR. WELCH: Your Honor, respectfully, I guess a couple of things. No. 1, that's never been raised in the litigation --

THE COURT: Well, it's been raised --
MR. WELCH: -- not that it shouldn't be.
THE COURT: -- in the contract that it's been raised.
MR. WELCH: Your Honor is raising that. I understand that. That issue itself has not been raised. I haven't thought about it, but to try to commit to that at this point would require some thought that I'm not sure the circumstances at the moment allow me to --
THE COURT: That's fine. I don't want -- I don't want to put you on the spot. Again, you know --
MR. WELCH: That's fine.
THE COURT: -- but I read these agreements looking for places where the term "business combination" was used.
MR. WELCH: Understood.
THE COURT: And what I came upon was places where both "business combination" is used in a manner that seems to encompass not just "merger" but also "acquisition transaction," which is obviously not a word in our transaction, "acquisition transaction,

merger or other business combination," suggesting that "business combination" is broad enough to include an acquisition, and it includes an acquisition of any of the company's subsidiaries, again, which made me think that if Vivendi wanted to turn around and unwrap this and say "We'd like to buy back Amber," that that would be viewed under this standstill as a business combination that Vivendi couldn't do. And it seemed to me that if buying back Amber was a business combination, then buying Amber was a business combination. But I didn't -- I mean, that was just me reading this.

MR. WELCH: Your Honor, understood. If -- if I can react. I -- I guess I would say it sounds like that language might restrict activities that didn't happen here because it's different language.

THE COURT: It is different language.

MR. WELCH: It's different language, and -- and it doesn't provide insight into the language we're discussing here in this --

THE COURT: Well, it provides some insight. I mean, it's "business combination or similar transaction," and it's "other business

combination or similar transaction," which infers that the same parties that were drafting this agreement -- because these are all drafted at the same time. What I just read to you is from exhibits to the stock purchase agreement.

MR. WELCH: Yes, sir.

THE COURT: So the same lawyers who are getting down and drafting these agreements and using the term "business combination," thinking about that concept, are using it at the same time in these exhibits and they're using it to say "other business combination," which implies a more expansive group of transactions. And then when they list the types of things that would fall within "business combination," they include these types of things that, again, seem to me to encompass the type of deal that we're talking about here. But I agree with you that it's not exactly the same language.

MR. WELCH: Your Honor, a couple of quick thoughts. No. 1, it is different language. No. 2, different words? How many times have we all been through this? Different words, different meanings. So I think it's interesting. Is it dispositive or decisive here? Respectfully, I would

say certainly not.

Not only that, the Airgas opinion tells us not only are we supposed to use common sense, we're supposed to look at the surrounding circumstances. Your Honor, we don't know what the surrounding circumstances were with respect to that piece of language. There could have been a lot of explanations for why they used different terms at different times. And so it would be a mistake for me --

THE COURT: Well, it's the same circumstances, isn't it?

MR. WELCH: Well, but it's applying two different events, Your Honor.

THE COURT: But these exhibits to the agreement are conditioned upon being signed -- a closing condition is that you-all have to sign these up. So the same supersmart people who were thinking about what "business combination" meant, like, used it under the exact same circumstances. This is all one deal.

MR. WELCH: Well, it's all one deal, but it -- it uses different words and I think applies it in a somewhat different context, which is Vivendi

buying back Amber. And I don't know, Your Honor, what --

THE COURT: Well, I was just speculating about buying back Amber because it's a -- it's a standstill on Vivendi. I mean, there's a similar one for ASAC, such that ASAC, at least as I read this, couldn't suddenly propose to buy Amber.

MR. WELCH: Your Honor, I think the focus probably derives from those two footnotes we put in the front end of our brief where we point out that there are a number of standstills and restrictions on transfer here. That was intended to be responsive to -- to Your Honor's question that you asked at the scheduling hearing. So I -- that's the reason those are in there. They do provide some restrictive conduct -- I mean, restrictions on the -- on the conduct of the parties and I thought would be responsive to the inquiry that Your Honor made.

THE COURT: No, no. I'm not -- I'm not saying you're not responsive. I'm saying it's helpful.

MR. WELCH: Yes, sir.

THE COURT: I mean, this is -- this is just -- I will tell you, as I was reading these

transaction documents, this is an issue that I wrestled with, because I'm going through here and I'm looking for times when the term "business combination" is used. I'm looking into insight as to whether these parties viewed this as a business combination.

So when I came across this, I said, "Oh, this is actually very helpful. Same set of transaction documents, same lawyers involved."

So this is good insight for me and I -- again, I wanted to get your read on it because I might be misreading it. I mean, you're closer to this than I am.

MR. WELCH: That's true.

THE COURT: You know, that's why I was asking the questions. I'm not trying to criticize your response or anything.

MR. WELCH: Thank you, Your Honor.

THE COURT: It's very helpful.

MR. WELCH: I think it's different words, and it would apply at a different time and under different circumstances. After this thing is signed up, then one would, I suppose, look to that depending upon what Vivendi wants to do or what Vivendi doesn't want to do. And I think we have to

look at those surrounding circumstances and call that shot at that time based upon that evidence and that record. And respectfully, Your Honor, I don't think there's anything in the record on that at this point in terms of what was intended or what --

THE COURT: Yeah, it's probably not in the record on anything. It's basically being presented as a pure contract case.

MR. WELCH: Well, Your Honor, I do think there's something in the record with respect to the charter provision. We know that it was adopted at the same time as the bylaw and is extremely broad. It applied to any agreement or any transaction, whereas the charter provision, although it started with the word "any," which we know doesn't limit the word "any" or "business combination," it, nevertheless, was different words, different words and far more narrow. And I think that's a context that is deserving of a huge amount of attention from the Court.

THE COURT: I agree with that. Absolutely.

MR. WELCH: Thank you, Your Honor.

Your Honor, 203 has come up in this. I don't really want to devote too much time with it.

I mean, Mr. Hanrahan points out in his reply brief that it does -- there is no 203 claim and 203 is not applicable here. So I -- I don't want to spend too much time on it.

I would note that it is an antitakeover statute. If one looks at treatises like Smith and Furlow, it's not designed to end or eliminate control. Martin Marietta said that --

THE COURT: It's sad that both Smith and Furlow are not practicing anymore, isn't it?

MR. WELCH: Pardon me?

THE COURT: It's sad that neither Smith nor Furlow are still practicing. I miss those guys.

MR. WELCH: Well, maybe we can bring them back.

THE COURT: Bring them back. We should.

MR. WELCH: It's a great idea.

THE COURT: I mean, when I was looking through it, like, there's so many lions of the Delaware Bar in those -- in those commentaries who aren't ... I mean, you're hanging on, Mr. Welch, and I appreciate that.

(Laughter)

THE COURT: You know, Goldman -- we've got Goldman commenting on the takeover statute. We've got, you know, Balotti commenting on the takeover statute, all these people that we love, and you and Mr. Hanrahan. It makes me a little emotional.

(Laughter)

MR. WELCH: Your Honor, to quote one of my favorite movies, "I'm too cute to die."

THE COURT: Touche.

MR. WELCH: Who said it? Richard --

THE COURT: No; touche, I said.

MR. WELCH: Richard Dreyfuss in the pilot's movie Always, it's called.

THE COURT: There you go.

MR. WELCH: I was -- I'm a pilot and I've had a few near misses. So I've always thought about that.

Anyway, turning to Martin Marietta, I mean, the Court refuses to adopt the 203 definition and says it's not sensible outside the antitakeover context. Ryan McLeod, before this argument, came up to me and said, "You know, the introductory language says 'as applied here only." Those definitions are in

203, but they're not intended to apply outside of that.

In Grand Metro v Pillsbury, a similar type of analysis. You had a charter provision which used the words "business combination," and the Court said there's no violation charged to 203 and no purpose in chasing it. It just doesn't apply here, and there's also other cases we've cited as well. Obviously, the parties could have incorporated the 203 definition but didn't. Plaintiffs' reply, I think, fundamentally admits that. And in Section 3.12(a)(iv) of the bylaws, they focused on 203. So the notion that somehow it was missed doesn't make sense.

And I do think that Craig Smith and Clark Furlow's book on 203, which references the ability to engage in a repurchase, fundamentally greenmail in that case, which -- that's a repurchase, as not being restricted by 203 is powerful. And I don't think that Frank Balotti's treatise contradicts that. I think he was talking about something different, Your Honor. With that, I'll leave that alone.

I would like to take a minute and talk about the balancing of the equities. We continue to

believe -- and I won't emphasize this too much in light of Your Honor's direction. We continue to believe that plaintiffs did wait until the last minute, and there may be good reasons for that. We don't know really what they were. It was announced July the 25th. The complaint wasn't filed until September 11, something like seven weeks.

THE COURT: Yeah. Actually, I'm happy to have you address it today. What I didn't want was a bunch of briefing on laches because I'd already read a bunch of letters on laches.

MR. WELCH: Yes, sir.

THE COURT: And I thought you guys did a great job covering laches, but don't hesitate to make the points that you feel need to be made.

MR. WELCH: Well, I think we are, of course, talking about two of the finest plaintiff firms in the business, no doubt about that. And in no sense are we -- would ever suggest anything to the contrary with respect to that. But I think there's a powerful case to be made that others did move quickly, others did seek 220, utilized 220 to obtain documents; and -- and for some reason, again, that didn't happen here.

Now, for purpose -- purposes of balancing of the equities, I'd like to focus just for a minute on the Dages affidavit. We talk about it in our brief, but the Dages affidavit, from my perspective, Your Honor, it's very helpful. He says that the SPA is beneficial to Activision and its shareholders, no doubt about it. Analyst commentaries, overwhelming powerful in favor. The market price increase that took place after the deal was announced was very significant, providing an immediate value to the shareholders of something like a billion dollars. The long-term benefits are overwhelming in the sense that it's likely to be accretive to earnings. It will eliminate a controlling stockholder, put control back in the hands of the public. He speaks of those issues in paragraphs 17 and 18 of his affidavit.

He points out that there's about a billion-dollar benefit with respect to the shares not owned by Vivendi. And, of course, plaintiff's counsel acknowledge in response to Your Honor's question at the scheduling hearing that a deal below market price can be very favorable. No doubt about that. In addition to that, there's about a billion --

1.36 billion of benefit with respect to the shares to be sold by Vivendi with respect to, again, the increase in the stock price there in light of the -- the stock purchase agreement 13.60 a share price.

So are there benefits to this transaction that are ascertainable, obvious, clear, and powerful? Yes. Are there also significant risks that we can face as a result of a temporary restraining order? Kevin Dages' affidavit is very clear on that as well.

One risk is loss of financing, he discusses at paragraph 19. He points out that the bank financing is not yet finalized. That's $2 1/2 billion. Now, we're getting close, obviously, and the expectation would be we would close tomorrow. But it was not finalized as of the time of the signing of the affidavit. Financings of this size, in the $2 1/2 billion range, in this market are extremely rare. He pointed out that there were only a couple he was able to identify. And an increase of 0.5 percent in interest -- in an interest payment could yield a hit to the cost of the loans of $87 1/2 million over the life of the loan term.

So is there a risk to the financing?

I wouldn't say -- I wouldn't make definitive statements. That involves other things that other people might do. To ignore the risk here that something could go wrong as a result of a TRO, I think would be an enormous mistake and would be a real detriment to the stockholders.

Now, loss to the stockholders directly to the share price, plaintiffs counsel denigrates that. Stocks go up, stocks go down. They went up here. They went up when the deal was announced. There was an extraordinary jump along with enormous commentary in favor of this transaction. The stock price went up. I can't imagine if a TRO were entered that we wouldn't see a major dive of some sort. I'm not going to predict that, but that's a -- that's a mistake, too. That's guessing what other people are going to do; but, on the other hand, to ignore it for purposes of the risk faced by Activision, faced by Vivendi and by the other players in this transaction, I think is a huge mistake. We can't do that.

Now, another risk to Activision is if Vivendi terminates the deal, if it's not closed by October the 15th. Now, I would hope they wouldn't, and maybe there are arguments that would apply that

would suggest that they couldn't; but the termination section says what it says. And, of course, market commentators have predicted that a fallback position on the part of Vivendi might well be some kind of a stock dividend. They've got a good number of directors on the board and bleeding cash out of the company, and it would not necessarily all go to a transaction that's as valuable and as significant and powerful as this one.

So from the standpoint of risks, it's easy to throw rocks and bricks and act like nothing is going to go wrong here. You know, as -- as another famous guy says, if he thinks -- "If you think nothing bad is going to happen, just keep on living." I quote Buddy Guy for that one, Your Honor, because in a situation like this where there is so much at stake, so much time and effort has been put into a transaction and so many things could go wrong. If the wrong order is entered, it's something that just can't be ignored.

Risks. We got risks to the stock market. We got risk to the debt financing. We got risk to the contractual relationships between the parties. All contributed by plaintiff's delay. We

wasted seven weeks that could have been used.

Now, irreparable harm. Well, there's no -- there's no colorable claim here, we don't believe, Your Honor. If one uses the common sense that the Supreme Court told us to use in Airgas and looks at what the -- what the companies did when they split off in terms of their bylaws and in terms of their charter, there is no colorable claim here. I would assert maybe there's irreparable harm. Maybe there's irreparable harm in the sense that if a TRO were entered, it would really be difficult to quantify the harm that could be caused to the stockholders of the company if the market falls, if the financing goes away, if the contracts come unraveled. But there's no irreparable harm beyond that. There's harm if -- if the wrong thing happens here, Your Honor, but not if the transaction is allowed to close.

The final point I would make is with respect to the bond. With a billion dollars in a market run-up alone -- and Mr. Dages, you know, testifies to it in his affidavit -- if something were to happen to that, you know, our Court has told us that we're supposed to protect against it with a TRO. We're -- we're supposed to do something with the bond

that would enable that to be dealt with in a way that's fair and equitable to everybody. Again, we pointed out a whole series of risks that would occur here that could be problematical. And I think if there's going to be a bond, it ought to be a really big one.

Now, plaintiff says, "Never going to be a problem. No issues here. The risks won't materialize." Respectfully, that's a big bet. And if you think things -- bad things don't happen in the event that -- that things develop in the wrong way -- and I think a TRO would be the wrong way -- you know, again, to quote Buddy Guy, just keep on living -- it's a big mistake.

Your Honor, unless Your Honor has any further questions, I have nothing further.

THE COURT: I don't. Thank you.

Mr. Savitt, how are you, sir?

MR. SAVITT: Well, Your Honor. Good morning and thank you for hearing us. It's always a pleasure to be with the Court. I'm going to try and keep my remarks very brief.

We -- we are here --

THE COURT: As long as you're

nonduplicative, you need not worry about the length of your reply.

MR. SAVITT: Well, I appreciate that as well and will do our best. We appreciate the Court's time.

We are here for the special committee of the Activision Blizzard board, three directors who are unaffiliated with anyone, who stood in the bargaining shoes of the public and were charged with representing the interests that Mr. Hanrahan and his client propose to represent as well. We join in the remarks of Mr. Welch from this morning, and -- and they articulate well the position of our client as well.

I'd wanted to just hit on a couple of points that I think have been discussed this morning and in -- and in the papers, and do so briefly, and take any questions that the Court may have that we might be in a position to best answer, if there should be any.

With respect to the question of the business combination and what it means, I'd wanted at the outset to just say a word in response to a point that the Court -- at least suggested an idea that the

Court suggested in its colloquy with my friend, Mr. Hanrahan, which I think was a very interesting point, a subtle one but an important one.

It's our position -- and we think it's clearly so -- that the Airgas decision is the present word of the Supreme Court as to the proper construction of the sorts of documents we are currently working through. I think Mr. Welch did a good job of expressing our view on that. I'll leave that there.

The Court, though, raised an interesting question, and it was this: Is there a different way of looking at the interpretation of a franchise right, of a voting right, if it is something that has its genesis in the DGCL, on the one hand, or if it is incremental and from outside the DGCL on the other? Very interesting question. And I think it's really one of a constitutional character. And after all, corporate law is in many respects a doctrine of constitutional law. And by that I mean it's one about how does one go about allocating the respective powers in the corporate form? And it is really quite one thing to say that the voting powers that are specifically prescribed by, for example, 251 or, for

example, the election of directors, need to be chaperoned and superintended with one degree of judicial vigilance to give effect to the organic statute of Delaware law, on the one hand; and on the other, to say that the same principle ought to apply for voting rights that are not articulated.

And the reason for that is that the basic allocation of responsibility, decision-making authority, and accountability is set forth in the statute. And everything in derogation of the statute needs to be very carefully superintended. By the same token, when the matters at issue are not in the statute, to apply the same sort of vigilance and superintendence risks to cut back on the appropriate allocation of authority that the General Assembly has created and that the courts are charged with enforcing. And this is a principle that has deep, deep roots in constitutional law, going back to Justice Brandeis' Tennessee Valley Authority decision and other such constitutional rules; but it's a principle that I think the Court has -- has suggested -- and I would say does apply here -- because this is not a circumstance where the statutorily required rights are being cut back upon. It's exactly the

opposite of that. And to --

THE COURT: And -- but there would no DGCL vote.

MR. SAVITT: That's right.

And -- and -- and the principle really is that who gets to get this question right or wrong? Who gets to decide? And the answer here is it's my clients who were doing their best, who have no conflicts, respecting whom no conflict has alleged, who know their counterparties, who have been at this for a long time. They're the ones who get to get this question right or wrong. And that's an important constitutional principle, and I think it deserves a voice here.

I also wanted to say a word about the Vulcan case -- we call it the Vulcan case in my house.

(Laughter)

MR. SAVITT: I know it's Martin Marietta in the papers. (Continuing) -- just because a lot has been said about it. A lot has been said about it that, candidly, surprises me, given what was actually at issue there. Because I will say this, Your Honor, properly understood, the Vulcan case is entirely adverse to my friend's position here.

The phrase "business combination," to be sure, was an issue in that case; but the question there was is that phrase elastic enough to cover a hostile merger, a merger? The question was is "business combination" elastic enough to capture another kind of merger as opposed to a friendly deal? Now think about that compared to what we're faced with here. In the event the Chancellor in Vulcan said no, it's not even that elastic. You can't even stretch it beyond a friendly merger, but that's not the salient lesson of this case for this Court in this motion.

The point is that no one in Vulcan thought it was even remotely plausible to argue that "business combination" could apply to a transaction other than one in which two operating companies were combining into one. The whole issue was whether "business combination" should extend to cover all mergers of business operations. The answer, as I say, was no. But the position of the plaintiffs here is, candidly, outlandish in light of the framework of the debate that took place in the Vulcan case and was ultimately resolved in favor of a narrow but common-sense construction of what the phrase ought to mean.

Just a word or two on laches and the balance of the harms. And I do not want to run the risk of -- of repeating matters that have been -- that have been already covered. But -- and I should say I want to echo Mr. Welch's point that no part of our argument here in the papers or this morning are intended to be -- express anything other than the greatest respect for Mr. Hanrahan and Mr. Zagar and their firms. I am happy to echo with all sincerity that they are worthy adversaries and terrific lawyers. This isn't a matter of seeking to impugn anyone. It's a question of really seeing whether the relevant standards to establish a legal test have been met. And the question is is whether delay has been excused.

The answer is no, it's not excused. I'll say a word on that in a second. The preliminary question, was there delay, the deal was announced in July. The claim was filed September 11th. By the time the claim was filed, it was already in the public that the debt was being priced and the transaction was imminent.

There's no question that this was a zero-hour application. Roughly seven-eighths of the time that were available for litigation had passed.

There was delay. Was it excused? I have to say, Your Honor, I think the answer under law is no. The answer that my friend has given is that it just took all this time to uncover this claim. "Uncover" is the word used in -- in the briefs. Candidly, the -- the claim that's being raised is one that a controlling stockholder has to undertake certain steps before it can complete this transaction. The very first place you would look to see whether there was such a restriction is in the certificate of incorporation, which is a mere 13 pages long. Surely, counsel of the caliber of our worthy adversaries here would have known to look there. Surely, they did. And it can't be said that this is some little nugget of a claim that was found behind -- behind the cushions in the sofa in the attic. That's not this case.

This is a claim that if you think it makes sense -- and, respectfully, Your Honor, we don't think it does, and we think the reasonable inference is that the plaintiffs in the other cases reached the conclusion that it doesn't make sense. But if you think it makes sense, it's staring you in the face and it ought to have been promptly raised. It could have been promptly raised. It was not promptly raised, and

it ought be barred.

And the reason it ought to be barred is because there's very substantial harm flowed to defendants in consequence of this. Millions of shares of stock have traded hands on the basis of the supposition that this deal is going to close timely. Debt has been priced in the market. And more importantly -- most importantly, from my perspective -- we are now at a point where assuming -- contrary to fact and reason, in our view; but assuming a vote is ordered and assuming -- no reason to assume this, but assuming that Vivendi were prepared to accept that additional condition, we are incapable of getting it done before October 15th. And that could have been otherwise. Could have been otherwise, and it's not -- and there's no excuse. All of the elements of laches are well-met here, and the doctrine is as -- is as implicated as -- as it really could be.

Finally, a word or two on the balance of harms. The supposition in plaintiff's papers -- and I heard Mr. Hanrahan say it this morning -- is that this isn't a deal where the counterparty -- by that I speak of Vivendi -- might walk away because they have no place to go. It's not like a third-party

deal. Well, the truth is every third-party deal involves a situation where parties sat down and signed a contract and agreed they were going to go through with it; but that doesn't mean there is no risk that they will walk. There has been substantial market speculation of other alternatives available to Vivendi. As the representatives of the public, we stand here with no assurance that this deal will be put back together if conditions are imposed upon it beyond what the contract anticipates or if the timing anticipated in the contract cannot be respected due to the lateness of plaintiff's application.

And it's clear enough that Vivendi wants its cash. It wants its cash now. And we don't understand -- candidly, don't understand how the plaintiffs can breezily tell the Court that this deal will be waiting there after October 15th. There is nothing in the record to support that view. It is a mystery as well who will compensate the stockholders of this company, the public stockholders that my clients represent, if that billion dollars of stockholder value is lost. It certainly won't be plaintiff.

We know that because the telling last

sentence of the brief, the last sentence of the brief on the bond point says that the bond isn't there to compensate the stockholders. Well, what is? What we're being told is to rely upon the -- the -- the kindness of Vivendi, the kindness of a stranger, from our perspective. There's nothing here to protect the shareholders from a wrongful injunction. There is -- it's litigation without a safety net, and it's the stockholders who will take the fall.

And we think, candidly, that consideration, a billion dollars of stockholder equity hanging in the balance, on a late claim, on a debatable, debatable, at best, interpretation of words that, considered in common sense, don't work, is one that has to be denied as an appropriate exercise of -- of the Court's overarching equity.

THE COURT: You say you announced in July. You announced July 25th. Take me through the timeline that gets you to a vote.

MR. SAVITT: Oh.

THE COURT: So, I mean, assume -- the -- the Californians were in within a week. Actually, they were in it exactly a week. So assume that at that point there had been some type of

expedited proceeding on the vote issue and how -- and, you know, let's even be wild and crazy and think that that could happen in the same type of -- same type of week time frame that we're doing ours, and that even on that type of time frame, the Court would have ruled from the bench -- which if, frankly, you guys weren't ready to close tomorrow, I wouldn't rule from the bench -- that gets you to, you know, August 14th. How do you get to a vote?

MR. SAVITT: The Court is asking the question assuming we had had a timely ruling by August 15th -- August 15th --

THE COURT: Yeah.

MR. SAVITT: -- on -- on -- on an -- an emergency basis, saying "You need to have a vote."

THE COURT: Correct. I mean, that's the thrust of your argument.

MR. SAVITT: No; absolutely. And -- and you're saying well, how does it work that you get there on time.

THE COURT: Uh-huh.

MR. SAVITT: And this is operating on the assumption that Vivendi agrees to that, because I do need to make the point --

THE COURT: All right. So build in some extra time for that. You got to have a few extra days to go talk to Vivendi. So now you're up to August 19th, August 18th. How do you get to a vote?

MR. SAVITT: We need to put -- assuming that you are -- assuming that the proxy soliciting the votes will include materials incorporated by reference, you need 20 business days. If it does not -- and I don't know whether that would be possible here, though it's conceivable. It's been done -- though I don't think it's been done for 10 years -- you can get down to 10 business days.

But the Court's hypothesis in its mind -- and I'm happy to own it -- is that by some time in August, mid-August, mid to late August you could have a ruling on this for clarity. This Court certainly would have done that. And the question is whether you can get a proxy through the SEC in roughly a month. And I think the answer is yes. Would it be sure? No, I can't tell you for certain it would have happened. I can tell you that if it was the Court's order and it was achievable, heaven and earth would have been moved, and I think it would have been moved successfully. Certainly we'd have a real good shot.

Now we have no shot. Now we're at -- further at the mercy of counterparties.

And I can't tell you for -- look, if the SEC had decided to review it 10 times, we would been out of it, for sure; but there's no reason to think we would have been in that circumstance. And I think -- I think the timing that I've been suggesting, Your Honor, does indeed hold good.

THE COURT: Okay. Thank you.

MR. SAVITT: Thank you, Your Honor.

THE COURT: Mr. DiCamillo.

MR. DiCAMILLO: Good morning, Your Honor. I'd just like to address one point and, of course, answer any questions that Your Honor may have.

In our joinder in the opposition to the TRO, we dropped a footnote that said we are preserving our right to make Vivendi, the French entity, preserving its right to make a jurisdictional defense.

As a lawyer, the conversation you never want to have with your client is, "The judge thought you had a good argument, but because I didn't preserve it, the judge found it waived." That was all that was intended by that footnote. We have not

decided whether or not to make a jurisdictional argument. We will make that decision at the time we have to. We very well may not. Whether we do or we don't, the ultimate decider on whether or not there is jurisdiction over Vivendi, the French entity, is Your Honor. Not me. I can make arguments. Your Honor makes the decision.

So the fact that we put that footnote in the joinder should not be used as a basis to grant a TRO, which obviously is an extraordinary remedy, and that footnote should not change the analysis.

Unless Your Honor has any further questions --

THE COURT: Thank you.

MR. DiCAMILLO: -- I have nothing further.

THE COURT: Reply.

MR. HANRAHAN: Your Honor has been gracious enough to listen to us for awhile.

THE COURT: I'm just checking on the court reporter. How are you doing? I forgot.

THE COURT REPORTER: I'm fine.

THE COURT: Are you sure? I'm sorry about that. I should have checked in earlier.

MR. HANRAHAN: I would start my reply by asking if the Court has any questions on the presentations by defense counsel that the Court would like to ask.

THE COURT: To the extent you've got responses on things like laches and balancing hardships that you want to press on, that would be very helpful.

MR. HANRAHAN: Okay. Let's start with laches. It's very interesting that Mr. Welch said "Oh, well, you know, the other plaintiff, they used Section 220, and they got documents." I asked whether I could have those documents, and I was told no. And the reason I was given was because they don't relate to the vote claim. So, in other words, if we made a 220 demand, we wouldn't have gotten anything.

But what does that tell you? The special committee and board minutes don't have anything that talks about whether there was going to be a stockholder vote. So Mr. Savitt can stand here and say I should have looked at the certificate sooner; but based on the information we have, it appears that his clients, who he says were representing the public, they never looked at

Section 9.1(b). They never discussed whether or not a stockholder vote. So who are they to stand here now and say that I engaged in inexcusable delay?

And is it difficult to pull things together? Sure. Mr. Welch was surprised when Your Honor said "Hey, the amended investor agreement refers to a business combination." And I got to admit, I didn't catch that, Your Honor. None of us is perfect, and things take time. But they expect perfection. They expect -- and this is in a situation where there was -- on the face of the transaction, it wasn't a merger, it wasn't something where you said, "Oh, the DGCL requires a vote or" -- and they didn't say anything about a vote. Their transaction documents didn't say anything about a vote. So there's no laches here at all.

In terms of the balance of harms that they -- they speak of, we can go through their expert's affidavit. I mean, it's all about, "Well, if this happens" or "This could happen." It's all, as I think Mr. Welch said, guessing what other people will do --

THE COURT: I mean, that's part of what I --

MR. HANRAHAN: -- and -- and -- and guessing that Vivendi might take some kind of -- of exorbitant dividend that's going to bankrupt the company. Well, the Vivendi designees and Vivendi, they still have a fiduciary duty. So you can't assume that they're going to breach their duty and do something that's going to be devastating to the company.

So I think -- I think those kind of risks have to be balanced against the risk that essentially what they're saying is if there's financing, if people spent a lot of time, if analysts think it's a good idea, that we should just ignore a voting right that was created to protect the stockholders and to protect them with respect to what Vivendi might do or cause Activision to do.

And that's what's different about, you know, Mr. Smith and Mr. Furlow and -- and -- and the purpose of Section 203. Yeah, it's an antitakeover statute in general. That's the purpose. The "business combination" definition, on the other hand, the purpose of that was to protect stockholders from an interested stockholder; and the types of transactions that protect you include this type of

transaction. And so to say "Well, no, we're just not going to protect you from that," I -- I think leaves the stockholders at the mercy of Vivendi and management.

THE COURT: Assume, you know -- again -- and I take -- I have to take some stuff with a grain of salt. Assume I credit the idea that the favorable stock market reaction would at least be somewhat undermined if a TRO issues. How do I balance that --

MR. HANRAHAN: Well --

THE COURT: -- against your voting right?

MR. HANRAHAN: -- in essence, Your Honor, they're trying to substitute what the market says for a stockholder vote, say "Oh, well, you don't get a stockholder vote if there's activity in the market and analysts say this and" -- but the market doesn't get a vote. The analyst doesn't get a vote. It's a voting right of the stockholders. And that right comes with the -- the right to get fully informed, to get a full explanation of what this private sale is about, why it's in there, and why you have this -- this now three-party combination. The

stockholders are entitled to get that information and vote on it, not what happened on a given day in the market makes the decision for them.

Your Honor, there are a number of other things. Your Honor raised an interesting point about Amber. You know, Amber is going to become a subsidiary of Activision. And as I understand it, it's got to remain a subsidiary of Activision in order for those NOLs to be useful. Now, Mr. Welch pushes the NOLs aside and says "Oh, they're not anything." Well, the CFO of the company thought they were worth at least $200 million. And if -- instead of Vivendi threatening they won't -- you know, they want to put $200 million on the table, we'd be happy to talk to them about that. It's not nothing. It's a lot of money. And it is a significant asset. I don't know how people toss around $676 million of NOLs like it was a used napkin or something.

THE COURT: They live in different neighborhoods than I do and --

MR. HANRAHAN: Me, too, Your Honor.

THE COURT: -- they live in different neighborhoods than the median income of this country, which remains at 51,000 a year.

MR. HANRAHAN: Your Honor, is there anything further the Court would like to ask?

THE COURT: No. Thank you very much.

MR. HANRAHAN: Thank you.

THE COURT: So what I'd like to do now is take 15 minutes, come back at quarter of, and we'll talk further.

We'll stand in recess until then.

(A short recess was taken from 11:29 a.m. until 11:42 a.m.)

THE COURT: I deprived you of three minutes. My watch is off.

Let me start by thanking everyone for the hard work that went into preparing for today. I know a lot of people lost their weekends and probably had to sacrifice personal things to help me get ready for this. I do appreciate that. And I want to particularly thank the associates, who I suspect lost more of their weekends and personal lives than some of the partners. And the papers that were submitted were extremely helpful. Your arguments this morning were extremely helpful.

So today's hearing is so that the Court can consider a motion for a temporary

restraining order in Hayes versus Activision Blizzard, Inc., C.A. No. 8885. The plaintiff, Mr. Hayes, seeks to have the Court temporarily restrain the defendants from consummating transactions contemplated by a stock purchase agreement dated as of July 25, 2013. The grounds are that the parties are not seeking that the stockholder approval allegedly required by Section 9.1(b) of the company's amended and restated certificate of incorporation.

Now, there are other claims advanced in the complaint, including for breach of fiduciary duty. The TRO application seeks relief only under the charter provision. The breach of fiduciary duty claims aren't at issue today.

The defendants expect to close tomorrow, September 19th, 2013. Because of the time that elapsed between the announcement of the transaction at the end of July and the filing of the lawsuit, I'm treating the application as one for a preliminary injunction rather than a TRO. I'm doing that for reasons that I'll explain at greater length later, but primarily it is a less plaintiff-friendly standard than the TRO standard.

To give you the bottom line up-front,

nevertheless, applying the preliminary injunction standard, I believe the motion has to be granted. So the defendants are enjoined from proceeding with the transactions contemplated by the stock purchase agreement pending, one, trial on the merits; two, receipt of a favorable stockholder vote under Section 9.1(b); or, three, a modification of the injunction by this Court or, depending on how the parties wish to proceed, by the Delaware Supreme Court on appeal.

A little bit of factual background. Activision Blizzard, Inc. is a Delaware corporation with its principal executive offices in California. As of July 25, 2013, Activision had approximately 1.21 billion shares of common stock outstanding. Vivendi is a corporation organized and existing under the laws of France. Its 61.5 percent ownership interest in Activision is treated as one of Vivendi's business segments. Amber Holding Subsidiary Co. is currently a wholly owned subsidiary of Vivendi. It is a Delaware corporation. ASAC II LP is a limited partnership established under the laws of the Cayman Islands. These are the key players in terms of understanding the transactions.

From an historical standpoint, we have to start with the 2008 business combination between Activision and Vivendi. On December 1, 2007, Activision and a wholly owned subsidiary entered into a business combination agreement with Vivendi and two of its indirect wholly owned subsidiaries. As a result of this transaction, Vivendi came to own a majority of Activision's outstanding common stock. Since then, it's controlled the board and the company through Vivendi-affiliated directors. In connection with the transaction, the charter of Activision was amended to include Section 9.1(b), which is at issue in today's hearing.

By June 2012, for reasons that aren't entirely relevant, Vivendi decided to seek potential acquirers for all or part of its Vivendi's Activision business segment. I understand that Vivendi did not receive any offers, at least based on the materials that have been provided to me. Vivendi then turned to a deal with Activision.

On July 25, Activision, Vivendi, and ASAC announced the stock purchase agreement. Pursuant to the SPA, Activision will acquire Amber for 5.83 billion. Amber is defined in the SPA as "New

VH." At the time of the purchase, Amber will own 428 million -- really, if I round up, 429 million -- shares of Activision common stock, plus 676 million in NOLs. The effective purchase price of the shares works out to $13.60 per share, representing a discount of approximately 10 percent from Activision's trading price on July 25, 2013.

Also as part of the SPA, ASAC will purchase nearly 172 million shares of Activision's common stock at the same $13.60 per-share price. Now, ASAC is going to be controlled by Activision's two senior officers. The financing for the ASAC purchase is being provided by various large institutions who are also participating in the purchase. Given the numbers of the shares being sold by Vivendi, a little bit under 30 percent are going to ASAC.

The SPA has a termination date of October 15, 2013. After that point any party may elect to terminate it. Now, as a result of this transaction, Activision's stockholder profile will change materially. Before the transaction, Vivendi owns 61 percent, approximately, of the common stock and its rights are governed by an investor rights

agreement, a stockholders' agreement, as well as the charter. After the transaction, approximately 47 percent of Activision stock will be owned by Vivendi, the top two officers through ASAC and their affiliates. That number, that 47 percent includes their affiliates. Without their affiliates, the figure drops to approximately 37 percent. There will be a revised investor rights agreement. There will be a revised stockholders' agreement.

Now, it does appear from -- particularly from the investor rights agreement, that Vivendi plans to sell down its stake over time. It also appears from the stockholders' agreement that ASAC will have various rights to sell down or distribute to its own investors its stake over time. It does seem to be true therefore, to use Mr. Welch's analogy, that there is something of a separation in the offing; but it is a separation that will take place over time, subject to ongoing agreements by the parties, and it's a separation where the key step is essentially a reorganization in which Activision acquires Amber and the acquisition of Amber is an acquisition of a controlled subsidiary of Vivendi. And I'll get to the import of those concepts for

Section 9.1 in a moment.

Litigation was filed challenging the transaction. On August 1, 2013, five business days after the announcement, a derivative lawsuit was filed in California alleging that the directors breached their fiduciary duties. About a week later, on August 9th, another Activision stockholder made a demand to inspect books and records, again for the same purpose, breach of fiduciary duties. It was on September 11th that the plaintiff Hayes commenced the litigation by filing this complaint and seeking relief under Section 9.1(b). So by my count, 41 days elapsed between the announcement of the deal and the time of the filing of the Hayes complaint. At the time of filing, 34 days remained until the termination date. So in terms of determining how much time passed, certainly it's more than half the time had been expended.

Based on this series of events, the defendants have argued strenuously, both at the scheduling conference and also have reiterated this morning, that the entire application should be denied on grounds of laches. Laches requires a combination of two things: Unreasonable delay and prejudice. As

a threshold matter, I reject the idea that the fast filing by the California plaintiff is evidence that Hayes should have filed earlier. The timing of the California complaint suggests an opportunistic filing triggered on the announcement rather than any type of diligent research into the potential claims that were available. I think it's rather ironic the defendants have argued to me that I should defer and that they actually endorse the California plaintiff's judgment on the failure to assert the charter claims, while at the same time they reject the California plaintiff's judgment as to the explicit assertion of the corporate opportunity claims. This is not only inconsistent but clearly selective. The better inference is that in the short time between the announcement of the transaction and the initiation of litigation activity by the other plaintiffs, the charter claim simply wasn't diligenced.

Now, it's not surprising it wasn't diligenced, and it's far from clear that the amount of delay on these facts was unreasonable. There was no proxy statement describing the deal. The Form 8-K disclosure was minimalist and barebones. It runs about six pages and is essentially limited in its

description. The Form 8-K doesn't attach or refer to the charter or bylaws or make any reference to a stockholder vote. It's not, on its face, a transaction that would require a stockholder vote. The terms of the SPA actually contain representations that no vote is required. So all of these things I think are sufficient to throw a stockholder plaintiff off the scent as to the existence of a charter-based voting right and to make it more reasonable that it took some time for a diligent stockholder to focus on the charter and realize that the charter vote was potentially applicable.

I also don't think there's any prejudice to the defendants that would warrant a laches analysis. Given the top law firms involved, I'm certain that they analyzed the charter and bylaws. They had to think about this. It's somewhat surprising that, at least as Mr. Hanrahan reports, that there aren't any minutes or books and records that would relate to this subject; but regardless, this is something that I'm sure was discussed as part of the transaction. Also, the application is effectively being presented as a matter of law. It's not a situation where anybody would have to take

discovery.

In terms of the alternative timeline, I don't share Mr. Savitt's confidence that this could have gotten to a vote with an earlier filing. I actually think it's most likely that had the plaintiff moved diligently, it would have not filed -- or more diligently -- I'm not saying they didn't move diligently. Had they moved more diligently, they wouldn't have filed seven days after the announcement like the California plaintiff. It probably would have taken two or three weeks. I don't think under that circumstance you would have had a hearing in a week. I think you would have gotten a prompt hearing, but we ended up at this hearing because the defendants scheduled closing for tomorrow. I think you would have had a two- to three-week briefing schedule.

I mean, let's assume a two-week briefing schedule. And, as I say, I would, because of the significance of the issues here, I think a Court would prefer to give you something in writing rather than from the bench. What this all means is that we probably would have ended up with a decision or an outcome perhaps two weeks ago, and there would not have been time under those circumstances to get to a

vote, and that's at an optimistic schedule for the litigation.

Nevertheless, I do take into account the plaintiff's delay. The plaintiffs have proceeded under the TRO standard, which is more favorable to plaintiff because it only requires a colorable claim, and it focuses primarily on the existence of irreparable harm. There's less stress on balancing. It's really supposed to be used for short, fast-moving emergencies. I share the defendants' concern that a plaintiff shouldn't be able to contribute to the timing problem that generates the need for the TRO standard. So, therefore, I'm going to apply the preliminary injunction standard, which is more searching. Instead of a colorable claim, the plaintiff has to show a reasonable probability of success on the merits. There is heavier stress on the relative balancing of harms.

I'm now going to turn to the first element, which is reasonable probability of success on the merits. Section 9.1(b) of the charter states -- and I'm quoting -- "Unless Vivendi's Voting Interest (i) equals or exceeds 90% or (ii) is less than 35%, with respect to any merger, business combination or

similar transaction involving the Corporation or any of its Subsidiaries, on the one hand, and Vivendi or any of its Controlled Affiliates, on the other hand" -- I'm going to elide some words and pick up with "the approval of such transaction shall require the affirmative vote of a majority in interest of the stockholders of the Corporation other than Vivendi and its Controlled Affiliates, that are present and entitled to vote at the meeting called for such purpose."

So the requirement of a disinterested stockholder vote turns on whether the transaction in question is a "merger, business combination or similar transaction involving the Corporation or any of its Subsidiaries, on the one hand, and Vivendi or its Controlled Affiliates, on the other ...."

So the first key is "merger, business combination or similar transaction." It's not just a merger. It's not just a business combination. It's anything that is a similar transaction to a merger or a business combination.

The second key is it's not just between Activision and Vivendi. It includes between the corporation, Activision, or any of its

subsidiaries, on the one hand, and Vivendi, or its controlled affiliates, on the other. So it includes a business combination between the corporation, Activision, and one of Vivendi's controlled affiliates, here Amber.

I'm going to focus on "business combination" because that it's a broader term than "merger." So if it falls within -- I mean, you could conceivably not fall within "merger" and still fall within "business combination." So I'm going to focus on "business combination."

In Martin Marietta, Chancellor Strine thoroughly reviewed the different meanings of "business combination" as used in different contexts. He ultimately found the term fundamentally ambiguous. He noted that some M&A authorities have suggested the origins of the term in the accounting literature. The accounting literature currently defines a business transaction as one with implications for control. Mr. Welch argued vigorously this is a transaction that actually does involve a change of control. As he sees it, it's a change from Vivendi to the public stockholders. So that's, arguably, implicated here; but the parties have said they're not accounting for

the deal as a business combination. Nevertheless, as Chancellor Strine observed in Martin Marietta, the existence of this phrase in the accounting literature is consistent with its relatively expansive capacity.

The term also appears in the federal securities laws, such as SEC Rule 165, which defines it in terms of SEC Rule 145(a). There are various definitions and usages in treatises. The main Delaware usage is in Section 203. After considering all of these definitions, the Chancellor held -- and I'm quoting -- "A consideration of all these factors leads me to conclude that one cannot confidently say that the term business combination transaction has a single, clear meaning. The usages in analogous contexts are too varied ...." That's at page 1113 of his decision.

He was, therefore, forced to resolve the case based on extrinsic evidence and reach a contextually specific understanding of what "business combination" meant in the context of the confidentiality agreement without a standstill that was at issue in that case.

In the course of his reasoning, Chancellor Strine recognized that the purchase of the

stock of a wholly owned subsidiary could easily qualify as a business combination. That's found at page 1108 of his decision. He didn't hold as a matter of law that it meant that. He just recognized the term was sufficiently expansive to encompass that result.

That type of transaction is precisely what's happening here. Vivendi is selling Amber, a wholly owned subsidiary. Activision is acquiring it. This falls from the plain language of Section 9.1(b); in other words, a transaction involving the corporation, Activision, on the one hand, and a controlled affiliate of Vivendi, on the other hand. We also know from the fact that Activision will be using the NOLs, that there will be some combining, perhaps not in the technical legal sense of a combination of the subsidiary with another subsidiary of Activision, but a combining of the assets. This all fits with the dictionary definitions that the defendants have cited.

Now moving to the specific context of this case, my job is to read the charter as a whole with the other documents at issue. I think it's important to remember that Section 9.1(b) was put in

for the obvious purpose of limiting what a controlling stockholder could do, namely, Vivendi, without a stockholder vote. The purpose of the provision is, therefore, to limit the flexibility that a controlling stockholder otherwise would have with respect to the controlled company.

Given that context, the strongest analogy here is to limitations set forth in Section 203. I recognize the Delaware courts do not automatically import the definition of "business combination" in Section 203 into corporate documents. My point, rather, is Section 203 is illustrative. It indicates the types of business combinations that someone setting up a provision designed to limit the flexibility that a controller has would want to contemplate. The purpose of the "business combination" definition of Section 203 is to limit follow-on transactions between an interested stockholder and a corporation. Likewise, the purpose of Section 9.1(b), here, is to give a stockholder vote for certain follow-on transactions between Vivendi, the controlling stockholder, and the corporation.

As the definitions in Section 203 recognize, the risk in these transactions is the

controller will use its authority and influence to transfer value from the controlled company to the controller. You're not just worried about specific types of business transactions; you're worried about potentially value-transferring business transactions.

Now, if 203 would apply, this transaction would fall explicitly within Section 203 (3) -- let me slow down -- 203(c)(3)(ii). That provision defines a business combination to include "Any sale, lease, exchange, mortgage, pledge, transfer or other disposition ... to or with the interested stockholder ... of assets of the corporation ... which assets have an aggregate market value of equal to 10% or more of the aggregate market value of all the assets of the corporation ... or the aggregate market value of all the outstanding stock ...."

Why are you worried about that? Because it's one thing to for the corporation to repurchase some shares or transfer some assets to its controller; but when you're doing a big, big reorg., value can move. Cash is an asset of the corporation. Here, the 5.83 billion that Activision will be paying to Vivendi is more than 10 percent of Activision's

total assets of 13.411 million. It's obviously not a pro rata transaction. Only Vivendi is getting cash.

Now, again, I don't think that this is an effort by the drafters of the charter to explicitly incorporate this definition from Section 203. The question is what were they reasonably worried about at the time they drafted Section 9.1(b) and gave a stockholder vote on business combinations. What we know is they were giving that vote to limit and provide protection against actions of a controller. One of the things that could happen in just this type of current reorg. is value could move. And what Section 9.1(b) says is that disinterested stockholders get to make the decision on whether value should move or shouldn't move.

For similar reasons, I think this transaction would fall within Section 203(c)(3)(v). I don't think Home Shopping Network changes the result. The Home Shopping Network Court, then-Vice Chancellor Chandler, noted specifically that the company was not a party to the tender offer or/transaction in that case. Here, Activision is a party to the transaction. Activision is paying the money to acquire the controlled subsidiary of Vivendi.

So as far as I'm concerned, I think the concept of business combination encompasses this deal. But this is not just a business combination -- I'm sorry -- that the provision just doesn't extend to business combinations; it extends to things similar to business combinations. It extends to things that resemble business combinations. I think, therefore, it has to mean something more than just business combinations. It has to be read as a protective provision designed to give stockholders, the disinterested stockholders, a vote on something like this.

The defendants' briefs are extremely light on authority against this reading. Basically what I've gotten is the sound-bite argument that this is a divorce and not a combination. This is overly simplistic. It ignores Martin Marietta and Chancellor Strine's express recognition of the ambiguity of the term. It ignores Martin Marietta's explicit language on the type of transaction involving the acquisition of a subsidiary. It ignores the purpose of a provision like this in the charter which, as I say, is to give stockholders a vote on transactions with a controller that could have not just control

implications but value-transfer implications. It ignores, frankly, the structural similarities between the transaction mechanics by which the business combination was accomplished in 2008 and the current transaction. Yeah, they have different titles to the agreements and yeah, the long-term purpose of the agreement in 2008 was combining, whereas now it's a overtime divesting. I agree with all that, but the actual transaction mechanics involving the purchase of a subsidiary are very similar.

This also, in my view, answers the idea that common sense means these things are coming apart. Well, what I think I have to do is ask, as a common-sense matter, what is this charter provision designed to do? And as I've suggested, I think it's designed to give disinterested stockholders a vote on business combinations and things similar to business combinations involving the controller so that they can decide for themselves whether it's a good deal or not.

Given that fact, this type of major value-restructuring transaction, I think, is precisely the type of thing that common sense would dictate that disinterested stockholders would have expected to vote on and can expect to vote on because it could be a

good deal, it could be a bad deal; they get to decide.

The defendants have stressed heavily the idea that this appears to be a good deal. It is true, a repurchase of equity could be good or bad for the issuer. It depends on the relative value of what's being bought. Here, there's certainly evidence that Activision is getting a good deal. There's the market reaction. But more importantly, from my perspective, the smart money is on the buy side. I always look to what the directors and officers are doing in a self-tender or other type of repurchase or issuance transaction. Here, the smart money is buying at this price. That suggests to me that net-net, this is probably a good deal for Activision.

But the voting right here doesn't turn on whether a court thinks this is a good deal or not. The point is that it allocates that decision power to the disinterested stockholders. They get to decide whether actually this is a good deal or not. If you change the terms of the transaction just slightly, the pricing term just slightly, I think it makes it easier to see why this is a transaction you would expect the disinterested stockholders to have wanted a vote.

Assume that instead of being priced at

a 10 percent discount to market, this deal was priced at a 30 percent premium to market. In addition to the plaintiffs then complaining about the pricing of the transaction, we would all look at this and say "Wow, this is a situation where value could move to the controller. This is precisely the type of situation where disinterested stockholders would have wanted to bargain for a vote on this type of interested-party transaction."

This is -- this is a tough case because, again, it looks like this is a good deal for Activision; but in my view, the voting right analysis doesn't turn on whether I think it's a good deal or not. It doesn't turn on whether defendants think it's a good deal or not. This decision power is allocated to a majority-of-the-minority stockholders.

Against this reading of the charter, the defendants have pointed to the different language in Section 3.12 of the bylaws which contains a list of issues requiring independent director approval. Section 3.12(a)(iii) requires approval of a majority of independent directors for -- and I quote -- "any transaction or agreement between the Corporation or any of its Subsidiaries, on the one hand, and Vivendi

or any of its Controlled Affiliates, on the other hand, including any with respect to any merger, business combination or similar transaction involving [the] parties."

This provision is both broader and narrower than Section 9.1. It's broader in that it refers to "any transaction or agreement." It's narrower in that it refers to "between" rather than "involving." It's different. This is a Section 144-style provision. "Transaction or agreement" would extend to lots of stuff, services agreements, tax-sharing agreements, Activision renting Vivendi condos for their executives to use when they go to business meetings in Paris. All these types of things are interested related-party transactions, which, under this section, 3.12(a)(iii), would require independent director approval. The charter takes a subset of those transactions, "a merger, business combination or similar transaction," and says, "There we want a disinterested stockholder vote." It's dealing with the big stuff.

This is an $8 billion reorg. of Activision. Value is moving. Value is moving to the former controller. Value is moving to management.

And a core part of the transaction is the corporation, Activision's, acquisition of a controlled subsidiary of Vivendi. This is the type of thing that I think falls squarely within Section 9.1.

As secondary indications -- and I don't rely on these heavily -- in reading the documents as a whole, I did note, as I mentioned to Mr. Welch this morning, that there are uses of "business combination" in related deal agreements that reinforce this understanding. Section 3.3 of the amended and restated investor rights agreement with Vivendi has a standstill provision that bars Vivendi from entering into or agreeing -- it's phrased in terms of active verbs rather than is it gerunds? I don't know. Vivendi can't "... enter into or agree, offer, propose or seek to enter into, or otherwise be involved in or part of, any acquisition transaction, merger or other business combination or similar transaction relating to all or part of the Company or any of its subsidiaries ...."

"Other business combination" is defined or used here in an encompassing sense in the same transaction -- indeed, in an exhibit to the SPA -- to encompass an acquisition transaction involving a

subsidiary. As I suggested, I think this suggests that if Vivendi proposed to buy back Amber -- in other words, the opposite of what is currently happening -- that would be a business combination that Section 3.3 would bar. This provision also treats an acquisition transaction as an example of a business combination, consistent with the Chancellor's analysis in Martin Marietta. The stockholders' agreement in Section 3.01 contains a parallel standstill for ASAC.

The defendants also have said Amber is not a business. For Delaware law purposes, it is. I cited Seneca Investments, 970 A.2d 259, Court of Chancery from 2008. That decision collects cases, recognizing that acting as a holding company, which I assume is Amber's primary business at the moment -- actually, the documents indicate that it's its primary business at the moment -- is a valid business. And here it's not just shares; it's also the NOLs. It's got about $5 billion worth of assets. So in my view, Section 9.1(b) applies to the transaction currently under consideration.

I will now move to the next element, which is irreparable harm. It's established under our law that the deprivation of voting rights is

irreparable harm. The plaintiffs cited a variety of cases. There's no response to that point by the defendants. It's settled law.

Part of the problem there is the idea that you can't remedy the voting right issue postclosing. You can try to give a damages proxy. For that reason, I asked the defendants to consider taking action that could help the Court construct a remedy postclosing. I have not received any help in that area.

As the plaintiffs point out, it will likely be difficult to obtain money from any of the independent directors. Although the insiders at ASAC are likely quite wealthy and are providing a hundred million of the ASAC investment amount, it's not clear that they could support the type of judgment necessary to unwind the transaction. ASAC is a Cayman Islands entity. There is, indeed, a rep by ASAC regarding its investment intent. In terms of the defendants' response, I didn't get anything but a reiteration of that rep. They didn't take into account any flexibility that ASAC may have under the stockholders' agreement and the investor agreement to do other things with its shares. I have no assurance that the

shares would be available or that they could be unwrapped.

I also might have benefited from some form of undertaking by Vivendi. What I was told was the transaction can't be unwound and that Vivendi is reserving its right to contest jurisdiction, notwithstanding its consent to this Court's jurisdiction in the underlying agreements. It may be that Vivendi wants to hedge its bets. Certainly that's its right to do so. It doesn't help me with addressing the harm.

What I have here is consequently not just interference with the voting right, I have a situation where assets may leave the jurisdiction to a Cayman Islands entity and a French entity, neither of which has agreed that I can potentially recover them or remedy the situation. So this is a situation where the Court might not be able to do anything later.

Lastly, I come to balancing of harms. The balancing of the harms depends primarily on the defendants' point, which resonates with me, that this is likely a good transaction for Activision. As I've already said, though, under 9.1(b), stockholders get to decide that, not me, not the courts, not the

defendants.

In terms of the market reaction, a price is being set by the marginal buyer and seller. We don't know how people would vote. We don't know necessarily what the long-term holders think. In a proxy statement that describes the background of the transaction and the origins of the ASAC aspect of it, stockholders might reach a different view as to having management and favored investors taking, you know, just under 30 percent of the opportunity. Or they might like it. Some of the analyst reports that I've been given suggest that this is a good thing because it shows the top two managers are re-upping and recommitting to the entity.

Under 9.1(b) the stockholders get to decide how they want to view that. What I am doing is not deciding whether this is a good deal or a bad deal. I'm enforcing the company's own corporate governance structure that it put in place in 2008.

To the extent this is a really good deal that the stockholders love and should get, this problem is of the defendants' own making. In their view of the world, this was an easy vote to get. They could have structured the deal to do so.

In terms of the downside risk, we don't know what's going to happen. I don't know what's going to happen. I am certainly fallible. No one can see the future. What I do know is that Vivendi appears not to have developed meaningful alternatives to a deal with Activision. I do know Vivendi is getting 8.2 billion in this transaction. The indications are it can't raise similar amounts through a dividend. The max seem to be 2 billion-ish. Yes, there's some risk of loss there. Yes, it could be a sizable risk. I am not discounting that. But the people who get to decide that under the company's specific corporate governance structure are the stockholders.

To the extent there does need to be a vote, as Mr. Savitt pointed out, had people moved earlier and had I done this earlier, Vivendi still would have had to consent to a vote. Right now Vivendi will have to consent to an extension of the termination date. So in either situation, no matter when this went down, people needed Vivendi's consent. Here, the financing appears to be in place until December 18th. In contrast to the type of timing, it's actually a little bit more time between now and

December 18th. It will still be tight. Maybe that financing can be put off as well. But if a vote has to happen, it's because of the charter and the provision that was put in in 2008.

In terms of a bond, the defendants have sought a billion-dollar bond. That size bond, I think, effectively would render a nullity this Court's ruling. I couldn't help but note that in the stock purchase agreement itself, the parties agreed that in the event equitable relief would issue, no bond would be necessary. That's Section 11.11. The same is true in Section 8 of the investor rights agreement. In other words, when they were anticipating the possibility that there might be some equitable relief with respect to the deal, the parties didn't think a bond was required. I am happy and believe that it is equitable to go with that determination. This is also consistent with past precedent where we have not required a bond for stockholder plaintiffs that is material in the context of the transaction but, rather, only a bond that is relatively nominal, you know, not insignificant for many people, but really nominal.

What I'm going to do here, therefore,

is to impose on the plaintiffs only a bond that I think will offset the rough costs of this litigation. I think that will help deter litigation dilatants, but it will not deter meaningful challenges, such as the one that was brought here. So I'm going to impose a bond of $150,000. As I say, I know that's a drop in the bucket for the numbers that are being talked about here; but if one goes back and looks at the type of amounts that have historically been imposed on stockholder plaintiffs, that's at the very high end.

First thing I'll ask for is questions. Mr. Hanrahan?

MR. HANRAHAN: I have none, Your Honor.

THE COURT: Okay. Mr. Welch?

MR. WELCH: Your Honor, it occurs to me that we probably want to think about this; but it occurs to me one option which may be available to -- to us in the circumstance is to seek an interlocutory appeal. And with the time frames in mind, I would respectfully ask if Your Honor would be willing to certify such an interlocutory appeal under the -- under the Supreme Court's rules.

THE COURT: Yep. I mean, certainly

you have the right to do that. I think you can sit down, Mr. Welch.

MR. WELCH: Thank you.

THE COURT: I'll tell you, I think my job in these situations is to call it as best as I can see it. I think the Supreme Court's job is to tell you whether I got it right or not and to fix it if they think I got it wrong. I think part of that system working is the Supreme Court having the opportunity to do that. I don't think that it is in any way my place to try to do things that would interfere with the Supreme Court's ability to do that.

Now, I understand in this case they have the independent ability to take the interlocutory appeal regardless, but I will tell that you this is a situation that I think is perfectly appropriate for an interlocutory appeal. This is a big ruling that establishes the stockholders' legal right to vote on the transaction. It is a major transaction. It has significant consequences. If on appeal the Supreme Court said "No, Vice Chancellor Laster, you misunderstood everything. You got it wrong. The stockholders have no voting right," that would effectively be dispositive on this issue. My view is

that under these types of circumstances, this is an appropriate case for the Supreme Court to take.

Now, I want to stress that I'm not trying to tell them to take it. My job under the rules, under Supreme Court Rule 42 is to make a recommendation. I'm simply saying I recommend that they take it. And in my view, this is an appropriate situation to take it. I hope they will agree with me; but from an institutional standpoint, they're the final word, not Laster.

MR. WELCH: Your Honor, thank you very much. I deeply appreciate that. I wonder if it would be acceptable to Your Honor that we use this transcript essentially as your order and directive in connection with -- with -- with that certification.

THE COURT: What do you think, Mr. Hanrahan?

MR. HANRAHAN: Your Honor, I -- I think that I would question whether that -- we would have followed the procedural steps required by the Supreme Court's rule. I understand Your Honor's inclination, but it -- it may well be that we ought to look at the rule and make sure we follow those steps. It may even be helpful to Mr. Welch.

THE COURT: Well, here's what I'd suggest. And you gentlemen can sit down. I, unfortunately, have to get on a plane with Mr. DiCamillo because we're going out to Chicago to speak at a conference. So while I'm sure that we will -- I can assure you we will not talk about the case. I'm sure he won't hesitate to rabbit-punch me at least once during our journey.

I'm worried, therefore, that I may not be available to you as to the degree I would like to be for some of the time this afternoon and some of the time tomorrow. I certainly can make myself available to you by phone. What I think would be helpful to me is if the parties could stipulate to a form of preliminary injunction order that would implement my rulings. That, then, I can review remotely. I can enter it. That will give you, then, an order from which to seek certification. If you-all at that point proceed how you wish and what you think is in compliance with the rules, you've heard my view that I think this is one where -- again, I don't want to try to tell the Supreme Court what to do, but I recommend that this is one that they should have the opportunity to review.

And if that means that the appropriate course to make sure that things are perfected under Rule 42 is for Mr. Welch to make a motion, I'm happy to take that up on an expedited basis. And, again, if necessary, I can do it by phone. I will be back on Friday. I know, however, that, you know, this is something that if the Supreme Court were to take it, I'm sure the defendants would like to have an answer before October 15th.

So it's something where we shouldn't dally.

THE COURT: Anything else from this side of the room?

Mr. Savitt.

MR. SAVITT: Yeah. Just one thing on this particular issue, which is a bit of wreck. We are just very concerned, Your Honor, about not having a circumstance where, in the procedural steps that have to follow, we are incapacitated from our opportunity to present the Rule 42 matters to the Supreme Court immediately. So just wanted to --

THE COURT: No, no. I understand.

MR. SAVITT: -- so -- and I know everyone is working in good faith.

THE COURT: No one is going to play four corners on you.

MR. SAVITT: We --

THE COURT: So -- so --

MR. SAVITT: -- just wanted to make sure everyone was pushing on.

THE COURT: Yeah. I mean, I don't think Mr. Hanrahan is going to play four corners on you. If he did, I'm sure the Supreme Court would be irritated with him.

I mean, Mr. Seitz can guide you through this, but what I think -- was it your firm that did it or the other side that did it? Anyway, what people do not hesitate to do is to go ahead and perfect the appeal, file the notice of appeal, and then say "Dear Supreme Court, this is really moving fast. We're going to get you a copy of Vice Chancellor Laster's order and a copy of the transcript as soon as it comes in. We'll get you a copy of his actual recommendation on certification as soon as it comes in," et cetera. But I will leave you in the expert hands of Mr. Seitz, supported, as I'm sure he will be, by the expert insight of Mr. Scaggs, Welch, Micheletti, et cetera -- I don't want to leave anybody

out -- Mr. DiCamillo, everybody, all -- all the associates in the room. You will not be left alone, Mr. Savitt, I can assure you.

MR. SAVITT: Thank you, Your Honor.

THE COURT: Anything else?

(No response)

THE COURT: All right. Again, thank you, everyone, for the helpful briefing and for the argument this morning. I do think that this was a very interesting case and it was not an easy injunction to grant for all the reasons that I articulated, primarily based on the benefits of the transaction; but ultimately I think it has to be granted in light of the voting right.

We stand in recess.

(Court adjourned at 12:33 p.m.)

- - -

CERTIFICATE

I, NEITH D. ECKER, Chief Official Court Reporter for the Court of Chancery of the State of Delaware, Registered Diplomate Reporter, Certified Realtime Reporter, and Delaware Notary Public, do hereby certify that the foregoing pages numbered 4 through 110 contain a true and correct transcription of the proceedings as stenographically reported by me at the hearing in the above cause before the Vice Chancellor of the State of Delaware, on the date therein indicated, except for the rulings at pages 74 through 110, which were revised by the Vice Chancellor.

IN WITNESS WHEREOF I have hereunto set my hand at Wilmington, this 19th day of September 2013.

/s/ Neith D. Ecker

Chief Official Court Reporter
Registered Diplomate Reporter
Certified Realtime Reporter
Delaware Notary Public